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TAN SRI DATO' SRI MUHAMMAD SHAFEE MD ABDULLAH & ORS v. SAERAH SAAD LOBB (PROPOSED INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH J
B [ORIGINATING SUMMONS NO: WA-24NCVC-4335-09-2023]
22 AUGUST 2024

Abstract – *(i) In order to be effective, a sale and purchase agreement of a land must first of all be properly executed. The contemplation of parties must be given effect by the court. Since the formality of an executed agreement is a clear choice made by the parties, there can be no binding contract without a duly signed sale and purchase agreement. In such instance, it is only reasonable to conclude that there is no consensus ad idem. If a sale and purchase agreement remain as drafts and are never signed, it must follow that the contention on the purported 'registrable interest' pursuant to s. 323 of the National Land Code must fail; (ii) When a proposed intervener is a registered proprietor and satisfies the conditions under O. 15 r. 6(2)(b)(ii) of the Rules of Court 2012, he or she has a legal interest in the land.*

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LAND LAW: *Restraints on dealings – Caveats – Private caveats – Ex parte order granted in favour of applicants to extend validity of period of private caveats – Whether affected legal rights of registered proprietor – Whether conditions under O. 15 r. 6(2)(b)(ii) of Rules of Court 2012 satisfied*

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LAND LAW: *Sale and purchase agreements – Drafts and negotiations – Whether concluded – Whether sale and purchase agreements still in bargaining mode or had been finalised – Whether there was mutual agreement of parties as to terms and conditions of agreement – Consensus ad idem – Whether purported 'registrable interest' pursuant to s. 323 of National Land Code ought to fail*

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LAND LAW: *Sale and purchase of land – Impugned document containing terms – Whether could be treated as lock-out agreement – Whether could constitute basis for claim of caveatable interest in absence of duly executed sale and purchase agreement – Whether there was consensus ad idem*

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CIVIL PROCEDURE: *Intervener – Leave to intervene – Registered proprietor of lands as proposed intervener – Ex parte order granted in favour of applicants to extend validity of period of private caveats – Whether affected legal rights of intervener – Whether conditions under O. 15 r. 6(2)(b)(ii) of Rules of Court 2012 satisfied – Whether intervener allowed to intervene*

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The proposed intervener owned three lots of land, all of them adjacent to each other. The Kuala Lumpur City Hall ('DBKL') approved a development order for the proposed intervener to develop Lots 1, 2 and 3, which would involve, among other things, an exercise to re-draw and re-measure the boundaries of the three lots of land ('S and R exercise'). In the midst of developing the three lots of land, the proposed intervener wanted to sell the lands. The first and second applicants were interested to acquire Lots 2 and 3 at the price of RM20,000,000. The first and second applicants instructed the third applicant to make an offer to the proposed intervener towards the intended purchase price. Following a series of discussions, the proposed intervener accepted the offer made by the first and second applicants. The offer was made on the basis of certain terms contained in a document ('impugned document'). Pursuant to the offer, the proposed intervener agreed to sell Lots 2 and 3 to the first and second applicants. A booking deposit of RM400,000 ('deposit') was paid and the impugned document was signed by both parties. Subsequently, the parties exchanged a total of 14 draft sale and purchase agreements. In all draft agreements, Lot 2 had been specifically mentioned to be 2,126.3 square meters in measurement and Lot 3 to be 2,927.3 square meters. Sometime later, the proposed intervener, as the vendor, informed the first and second applicants, as the purchasers, that a S and R exercise on the two lots needed to be carried out. According to the first and second applicants, the proposed intervener had allegedly assured them that the S and R exercise would not result in a reduction of more than 2% in size for the two lots of land. However, the first and second applicants alleged that they were only subsequently informed that if the S and R exercise were to be approved, the respective re-measured sizes for the two lots of land would go through a reduction, which the first and second applicants were not agreeable with. The proposed intervener did not agree with the applicants' proposed amendments and decided that the sale and purchase transaction could not go on as the parties were unable to agree on the terms of the agreement, and arranged for a refund of the deposit. The applicants responded, stating that the impugned document was a lock-out agreement and alleged that the proposed intervener had committed a breach of it. Subsequently, the first and second applicants entered a private caveat against the two lots of land. The proposed intervener applied to the Registrar of Land Titles ('Registrar') to have the private caveat removed. The Registrar then accordingly sent to the applicants notices of intended removal in Form 19C pursuant to s. 326 of the National Land Code ('NLC'). The applicants filed a legal action ('writ action') to compel the proposed intervener to execute the sale and purchase agreement for the sale of the two lots of land in accordance with the original measurements as specified in the impugned document, and also claimed for damages. The first and second applicants also filed an *ex parte* application for an order to extend the validity period of the private caveats. The first and second applicants managed to secure the *ex parte* order and pursuant to this, the validity of the private caveats was extended for a

A further period of 12 months. In the present instance, the proposed intervener applied for leave to intervene and to set aside the *ex parte* order for extension of the validity period of the two private caveats. The proposed intervener also applied, in the alternative, to have the private caveats removed. The issues that arose were (i) whether leave to intervene ought to be allowed; B (ii) whether the *ex parte* order ought to be set aside; (iii) whether the applicants had a caveatable interest; and (iv) whether the interest of the caveator in the land was not frivolous or vexatious and raised a serious question to be tried.

C **Held (allowing proposed intervener to intervene; setting aside *ex parte* order):**

(1) The entry of a private caveat is a statutory prohibition against any dealing in respect of the land in question. In the present application, the proposed intervener was the registered proprietor of Lot 2 and Lot 3. The *ex parte* order granted by the court in favour of the applicants which D extended the validity period of the private caveats for the period of 12 months from its expiry obviously affected her legal rights directly. The proposed intervener could not deal with her two lots of land as the private caveats had remained in force. The proposed intervener had legal interest since her rights as the registered proprietor of Lot 2 and E Lot 3 were directly affected by the *ex parte* order and any other order which may be made in the proceeding. The proposed intervener had satisfied the conditions under O. 15 r. 6(2)(b)(ii) of the Rules of Court 2012. Thus, the proposed intervener was allowed to intervene. (paras 30-32)

F **(2)** The fact that each draft of the sale and purchase agreement had always been made subject to final approval and that the parties were at liberty to make further amendments prior to its execution suggested that negotiations of the terms and conditions had not been concluded. This was in contrast with the position taken by the applicants in their written G submissions that the sale and purchase agreements had been finalised and 'came into existence'. Neither party was suggesting that the sale and purchase agreement had been executed. The parties were still in bargaining mode. The parties could not be taken to have agreed on the terms of any particular draft until the sale and purchase agreement was H duly signed by both. (paras 34-36)

(3) The fact that at its inception the impugned document was never treated as a lock-out agreement between the parties was relevant to assess and determine the prevailing intention of the parties. The contemporaneity of relevant documents with a set of alleged facts would render a I particular inference probable or otherwise. These facts were material to the *ex parte* application. Had they been disclosed at the time when the applicants applied for the *ex parte* order, this court would have

considered the *ex parte* application on a different footing. These material facts had not been disclosed by the applicants when the *ex parte* application was made. (paras 37-39)

(4) A careful reading of the impugned document would immediately show that it was to evidence the receipt of the sum of RM400,000 from the third applicant or its nominees. It showed that the RM400,000 was paid as a booking deposit for the purchase of Lot 2 and Lot 3. It specified the necessity to have a mutually agreed sale and purchase agreement to be signed within 21 days. It spelt out how the booking deposit was to be treated should there be a withdrawal from the transaction. It contained the proportion and manner of payment of the purchase price. It laid down the consequences if the proposed intervener chooses not to proceed with the sale transaction after the terms had been mutually agreed between the parties. It declared the two lots to be sold on 'as is where is' basis. The impugned document did not even come close to the description of a lock-out agreement known in law. This court could not fathom how such an agreement could constitute a basis for the applicants' claim of a caveatable interest in the two lots of land in the absence of a duly executed sale and purchase agreement. (paras 54 & 55)

(5) The contention of the applicants that the respective sale and purchase agreements for the two lots of land had been 'finalised' and 'came into existence' was without basis. In order to be effective, the sale and purchase agreement must first of all, be properly executed. That would serve as a signification that the parties had agreed with the terms and conditions contained in the sale and purchase agreement. Herein, the sale and purchase agreements remained as drafts and were never signed. It must follow that the contention on the purported 'registrable interest' pursuant to s. 323 of the NLC must fail. (paras 58 & 60)

(6) The applicants failed to demonstrate the existence of a serious issue to be tried. The impugned document did not fit the label of a 'lock-out agreement' despite being repeatedly called as such by the applicants. Without first qualifying as a lock-out agreement in the true sense of the word, a consideration of whether in fact the impugned document constituted a serious issue to be tried as to the caveatable interest of the applicants was utterly inconceivable. (para 62)

(7) The decisive factor was the mutual agreement of parties as to terms and conditions of the sale and purchase agreement. Where the parties were unable to mutually agree on the terms, there could not be a *consensus ad idem*. The 'mutual agreement' term was manifestly explicit in the impugned document whereas the alleged terms in respect of the obligation to preserve the respective sizes of the two lots of land or the

acceptable 2% margin for any changes in size were conspicuously not. Thus, there were no serious issues to be tried insofar as the alleged caveatable interests of the applicants were concerned. (paras 64 & 65)

(8) Since the applicants failed to demonstrate that they had acquired a caveatable interest in respect of the two lots of land, damages would be adequate compensation should this court return a finding favourable to them. Their interest should remain monetary as distinguished from proprietary. On the same breadth, the balance of convenience was in favour of the first defendant. (para 66)

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners) [1996] 3 CLJ 393 HC ***(refd)***

Brink's Mat Ltd v. Elcombe [1988] 1 WLR 1350 ***(refd)***

Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor [2015] 8 CLJ 1068 FC ***(refd)***

Devi Meyyammai M Ramanathan & Anor v. Hartini Mohamad & Anor [2013] 3 CLJ 31 CA ***(refd)***

Hu Kim Ai & Anor v. Liew Yew Thoong [2004] 5 CLJ 515 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

Pitt v. PHH Asset Management Ltd [1993] 3 All ER 961 ***(refd)***

Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(refd)***

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 SC ***(refd)***

Walford v. Miles [1992] 1 All ER 453 ***(refd)***

Legislation referred to:

National Land Code, ss. 322(2), 323(1)(a), (b), (c), 326, 327

Rules of Court 2012, O. 15 r. 6(2)(b)(i), (ii)

For the applicants - HL Lee & Jacqueline Ong; M/s HL Lee & Co

For the intervener - Lee Xin Div & Foo Joon Liang; M/s Gan Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

(Encl. 8)

Ahmad Shahrir Mohd Salleh J:

Introduction

[1] The proposed intervener owns two lots of land at Taman Duta, Kuala Lumpur and the first and second applicants were the prospective purchasers. The parties entered into an arrangement for the sale and purchase of the two lots of land but the transaction did not go through. The first and second applicants and the proposed intervener were at odds as to the cause of the aborted deal.

[2] This had led the first and second applicants filing legal action against the proposed intervener. Subsequently, the first and second applicants entered a private caveat on the two lots of land.

[3] Following the entry of the private caveats, the proposed intervener, as the proprietor of the two lots of land, applied to the Registrar of Land Titles to have both the private caveats removed. After the statutory notice under s. 326 of the National Land Code for the intended removal of the respective private caveats were served the first and second applicants applied for and successfully obtained an *ex parte* order to extend the validity of the private caveats.

[4] Now, the proposed intervener applied for leave to intervene and to set aside the *ex parte* order for extension of the validity period of the caveats. In the alternative, the proposed intervener applied to remove the private caveats. After considering the respective positions of the parties as deliberated in their submissions, this court set aside the *ex parte* order for extension of the validity period of the private caveats. The applicants were not satisfied and filed an appeal.

Salient Background Facts

[5] The proposed intervener owns three lots of land. All of them are adjacent to each other. Although the three lots of land belong to the proposed intervener, they were managed by her husband, Rodney. The three lots of land were described as follows:

(i) Pajakan Negeri No. Hakmilik 166, No. Lot 33791, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan measuring approximately 1,956.1 square meters ("Lot 1"),

(ii) Pajakan Negeri No. Hakmilik 167, No. Lot 33792, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan measuring approximately 2,126.3 square meters together with a residential house built thereon ("Lot 2"), and

(iii) Pajakan Negeri No. Hakmilik 168, No. Lot 33793, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan measuring approximately 2,927.3 square meters ("Lot 3").

[6] Sometime towards the end of October 2012, the Kuala Lumpur City Hall ("DBKL") approved a development order for the proposed intervener to develop Lots 1, 2 and 3. The proposed development will involve, among other things, an exercise to re-draw and re-measure the boundaries of the three lots of land. This was referred to the S and R exercise.

[7] In the midst of developing the three lots of land, the proposed intervener had a change of heart and wanted to sell them instead. This ultimately led to a discussion between one Mr Rohan, who is a business partner of Rodney, and a real estate agent, one Mr Thevan ("Mr Thevan") of Thevan Realty.

[8] According to the proposed intervener, sometime in August 2020, Mr Thevan made a representation to Mr Rohan that he had a party who was interested to acquire Lot 2 and Lot 3 at the price of RM20,000,000. The fact of the impending S and R exercise was then duly brought to the attention of Mr Thevan by Mr Rohan in the early discussions. It was also brought to the attention of Mr Thevan of the following matters:

(i) that the sizes, measurements and layouts of the three lots of land will be subject to the development order and the S and R exercise,

(ii) that new issue documents of title for the three lots of land will be issued upon completion of the certificate of completion and compliance (CCC).

[9] Sometime in December 2021, the first applicant was approached by Mr Thevan. In the meeting, Mr Thevan made an offer to the first applicant to purchase the proposed intervener's lands. About six months later, the first applicant and his wife, the second applicant, visited the location of the two lots of land and became interested to purchase them. The first and second applicants later instructed the third applicant to make an offer to the proposed intervener towards the intended purchase which the third applicant did.

[10] Following a series of discussions, the proposed intervener accepted the offer made by the first and second applicants. The offer was made on the basis of certain terms contained in a document dated 13 June 2022 issued by Messrs Thevan Realty ("impugned document"). Pursuant to the offer, the proposed intervener agreed to sell Lot 2 and Lot 3 to the first and second applicants at the total purchase consideration of RM20,000,000. A booking deposit of RM400,000 ("deposit") was paid to Messrs Thevan Realty and the impugned document was signed by both parties. The deposit was to be forfeited if the applicants, as the purchasers, withdraw from signing the sale and purchase agreement for any reason except if the parties cannot agree on the terms and conditions of the sale and purchase agreement.

[11] As a way forward in completing the sale and purchase transaction, the parties appointed their respective conveyancing solicitors. The proposed intervener appointed the firm of Messrs Shahrizat Rashid & Lee to represent her as the vendor and the applicants appointed the firm of Messrs Tai & Partners to represent them as the purchasers.

[12] The terms contained in the impugned document were acknowledged with the respective signatures of the third applicant as the purchaser and the proposed intervener as the vendor. Essentially, the terms under the impugned document were as follows:

(i) that the purchase price for the two lots of land was RM20,000,000, A

(ii) that the sale and purchase agreement must be signed within 21 working days subject to its terms being mutually agreed between the vendor and the purchaser,

(iii) that the two lots of land were sold on "as is where is" basis. B

[13] The parties agreed to have separate sale and purchase agreements done for each lot of land. For purposes of convenience, it was agreed between the parties that they will first work on the terms of the sale and purchase agreement for Lot 2. Upon the terms of the sale and purchase agreement for Lot 2 being finalised, the same terms shall apply for the sale and purchase C agreement for Lot 3. It was also agreed that the first and second applicants shall be named as the purchasers in the sale and purchase agreement for each lot of land.

[14] Between June 2022 and February 2023, the record showed that the D conveyancing solicitors exchanged a total of 14 drafts sale and purchase agreement, the last being on 18 February 2023. In all draft agreements, Lot 2 has been specifically mentioned to be 2,126.3 square meters in measurement and Lot 3 to be 2,927.3 square meters. On each exchange for approval of the terms, the respective conveyancing solicitors gave their comments and treated the impending transaction on the "subject to contract" E basis until the sale and purchase agreement was duly executed.

[15] Sometime in the middle of September 2022, the conveyancing solicitors for the proposed intervener as the vendor informed the conveyancing solicitors for the first and second applicants as the purchasers that a surrender and re-alienation ("S and R") exercise on the two lots needed F to be carried out. In fact, three days earlier, the proposed intervener had already made the necessary submissions to the land registry for the S and R exercise.

[16] According to the first and second applicants, the proposed intervener had allegedly assured them that the S and R exercise will not result in a G reduction of more than 2% in size for the two lots of land. Based on this understanding, the first and second applicants agreed to the inclusion of certain clauses relating to the S and R exercise in the 11th draft sale and purchase agreement.

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[17] However, the first and second applicants alleged that they were only subsequently informed that if the S and R exercise were to be approved, the respective re-measured sizes for the two lots of land would become:

(i) 1,862.3 square meters or an approximate reduction of 13.24% in size for Lot 2; and I

(ii) 1,865.3 square meters or an approximate reduction of 44.32% in size for Lot 3.

[18] Since the proposed intervener also owns Lot 1, which is adjacent to Lot 2 and Lot 3, the S and R exercise will affect Lot 1 favourably. If approved, the S and R exercise will result in a 67.73% increase in size for Lot 1. That was translated as an increase from 1,956.1 square meters in its original measurement to 3,281 square meters in its re-measured size. The first and second applicants were not agreeable with the eventual reduction in sizes for the two lots of land as a result of the S and R exercise.

[19] On 20 April 2023, the applicants' conveyancing solicitors wrote to the proposed intervener's conveyancing solicitors stating that the applicants were agreeable with the terms in draft No. 11. However, the applicants' purported agreement with the terms in draft No. 11 was made subject to further amendments. Pertinently, at the material time, the conveyancing solicitors had already exchanged the 14th draft.

[20] The proposed intervener did not agree with the applicants' proposed amendments and instructed her conveyancing solicitors to write to the applicants' conveyancing solicitors that the sale and purchase transaction cannot go on as parties were unable to agree on the terms of the agreement. The parties tried to resolve their differences but that resulted in an impasse. The proposed intervener's conveyancing solicitors then asked the applicants' conveyancing solicitors to liaise with Mr Thevan for a refund of the deposit.

[21] Two days later, the applicants' conveyancing solicitors wrote a response and stated that the impugned document was a lock-out agreement and alleged that the proposed intervener had committed a breach of it. By this letter, the applicants' conveyancing solicitors denied that the parties were unable to mutually agree on the terms of the sale and purchase agreement. The applicants' conveyancing solicitors then went on to assert certain terms allegedly to be implied from the purported "lock-out agreement".

[22] Subsequently, the first and second applicants entered a private caveat against the two lots of land. After having notice of this, the proposed intervener then applied to the Registrar of Land Titles to have the private caveat removed. The Registrar of Land Titles then accordingly sent to the applicants notices of intended removal in Form 19C pursuant to s. 326 of the National Land Code. The Form 19C notices specified the period of two months for the intended removal of the private caveats on the two lots of land. The deadline for removal of the private caveats was on 8 October 2023.

[23] Some six weeks after the Form 19C notices were served, the applicants filed a legal action ("writ action") to compel the proposed intervener to execute the sale and purchase agreement for the sale of the two lots of land in accordance with the original measurements as specified in the impugned document. In that writ action, the applicants also claimed for damages.

[24] The following week, the first and second applicants filed an *ex parte* application for an order to extend the validity period of the private caveats. The first and second applicants managed to secure the *ex parte* order on 3 October 2023. Pursuant to the *ex parte* order, the validity of the private caveats was extended for a further period of 12 months from 8 October 2023 to 8 October 2024.

[25] In the present instance, the proposed intervener applied for leave to intervene and to set aside the *ex parte* order for extension of the validity period of the two private caveats. The proposed intervener also applied in the alternative to have the private caveats removed.

Analysis And Findings

Whether Leave To Intervene Ought To Be Allowed

[26] The proposed intervener applied for leave to intervene in the *ex parte* originating summons filed by the applicant and further prayed for the following reliefs:

(i) for the *ex parte* order dated 3 October 2023 to be set aside,

(ii) alternatively, for all caveats entered on Lot 2 and Lot 3 arising out of the applications and/or actions of the applicants be immediately removed pursuant to s. 327 of the National Land Code,

(iii) for the Director of Lands and Mines, Federal Territory of Kuala Lumpur, the Registrar of Titles and all other appropriate authorities to be ordered pursuant to s. 327 of the National Land Code to give effect to the order of this Honourable Court,

(iv) for damages to be assessed and paid, jointly and severally, by the applicants to the proposed intervener,

(v) for all proceedings to be stayed pending the disposal of the application,

(vi) for cost (including the allocatur fee) to be paid, jointly and severally, by the applicants to the proposed intervener, and

(vii) for such further and/or other reliefs as this court deemed fit.

[27] In order to intervene in the context of the present proceeding, it is incumbent on the proposed intervener to satisfy either the conditions under sub-para. (i) or (ii) of O. 15 r. 6(2)(b) of the Rules of Court 2012.

Order 15 r. 6 of the Rules of Court 2012 reads as follows:

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Order 15

Causes Of Action, Counterclaims And Parties

Misjoinder and non-joinder of parties (O. 15 r. 6)

6. (1) A cause or matter shall not be defeated by reason of the misjoinder
B or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own
C motion or on application -

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party:

(b) order any of the following persons to be added as a party, namely
D -

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

E (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

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(3) An application by any person for an order under paragraph (2) adding him as a party shall, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

G (4) A person shall not be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

[28] In *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405; [2009] 6 MLJ 307; [2009] 2 MLRA 453, His Lordship Zulkefli Makinudin FCJ (later PCA) reiterated the applicable principles for a party
H to intervene in a particular proceeding. His Lordship said as follows:

[19] Under O. 15 r. 6(2)(b) of the RHC, the proposed intervener must establish under limb (i) that he ought to have been joined as a party or his presence before the court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated
I upon. Whilst under limb (ii) the proposed intervener has to establish that he has an interest in the subject matter of the action and the court considers just and convenient to determine the issue as between him and any party to the action as well as between the parties to the action within the same proceedings.

[29] The then Supreme Court in *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344; [1992] 2 MLJ 63; [1992] 1 MLRA 350 referred to the decision of the Privy Council in *Pegang Mining Co Ltd* and accepted the position of the law that the legal interest of the proposed intervener is a condition which must be established for a party to be added in a particular proceeding. In delivering the decision of the Supreme Court in *Tohtonku Sdn Bhd* (*supra*), His Lordship Mohd Yusoff Mohamed SCJ remarked as follows:

> It is settled law, on the authorities, that a party may be added if his "legal interests" will be affected by the judgment in the action but not if his commercial interests alone would be affected: per Lord Diplock in *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1973] CLJU 107; [1973] 1 LNS 107. In that case, the Privy Council had formulated the test to determine whether a party's interests in the matter are "legal" or merely "commercial" in the following words (at p. 56):
>
> > A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in this action?

[30] The entry of a private caveat is a statutory prohibition against any dealing in respect of the land in question. The proprietor of the land practically cannot deal with the property for as long as the caveat remains in force. This is provided under s. 322(2) of the National Land Code.

Section 322(2) of the National Land Code reads as follows:

> **Nature and effect of private caveats**
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> 322. (2) The effect of any private caveat expressed to bind the land itself or an undivided share in the land shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of -
>
> (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;
>
> (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and
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> (c) any lienholder's caveat in respect thereof:
>
> Provided that where the claim is in respect of a part of the land, the caveat binds the whole land and where the claim is in respect of an undivided share in the land, the caveat binds the whole of the undivided share in the land.

[31] In the present application, the proposed intervener is the registered proprietor of Lot 2 and Lot 3. The *ex parte* order granted by this court in favour of the applicants, which extended the validity period of the private caveats for the period of 12 months from its expiry, obviously affected her

A legal rights directly. The proposed intervener could not deal with her two lots of land from 8 August 2023 to 8 October 2024 as the private caveats had remained in force.

[32] On this basis, this court found that the proposed intervener did have a legal interest since her rights as the registered proprietor of Lot 2 and
B Lot 3 were directly affected by the *ex parte* order and any other order which may be made in the proceeding. The proposed intervener has satisfied the conditions under O. 15 r. 6(2)(b)(ii) of the Rules of Court 2012. As such, I allowed the leave to intervene.

C *Whether The Ex Parte Order Ought To Be Set Aside*

[33] Learned counsel for the proposed intervener submitted that the *ex parte* order ought to be set aside, among others, due to non-disclosure of certain material facts. This was in relation to the fact that all the draft for the sale and purchase agreement were exchanged on the following basis:

D (i) that each draft agreement was subject to final approval,

(ii) that the parties reserved their rights to make further amendments to the terms and conditions of the sale and purchase agreement at any time prior to its execution, and

E (iii) the parties had never referred to nor treated the impugned document as a lock-out agreement up until much later when the impasse between the parties escalated into a dispute.

[34] The fact that each draft of the sale and purchase agreement had always been made subject to final approval and that the parties were at liberty to
F make further amendments prior to its execution suggested that negotiations of the terms and conditions had not been concluded. This was apparent on a perusal of the numerous email exchanges between the parties when enclosing a particular amended draft of the sale and purchase agreement.

G **[35]** This was in contrast with the position taken by the applicants in their written submissions that the sale and purchase agreements have been finalised and "came into existence" on 20 April 2023. To this end, interestingly neither party was suggesting that the sale and purchase agreement had been executed.

H **[36]** At the material time, the parties were still in bargaining mode. Given the size of the purchase consideration, it would be reasonable to infer that the bargaining process between the vendor and the purchasers were still dynamic then. The parties cannot be taken to have agreed on the terms of any particular draft until the sale and purchase agreement was duly signed by both.

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[37] The fact that at its inception, the impugned document was never treated as a lock-out agreement between the parties was relevant to assess and determine the prevailing intention of the parties. The contemporaneity of relevant documents with a set of alleged facts would render a particular inference probable or otherwise.

[38] In *Hu Kim Ai & Anor v. Liew Yew Thoong* [2004] 5 CLJ 515; [2004] 7 MLJ 590; [2002] 4 MLRH 381; [2004] 3 AMR 306, the High Court referred to the English Court of Appeal case of *Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350, which observed that material facts are facts which is material for the judge to have in mind when considering the application. In this regard, His Lordship Vincent Ng J (later JCA) made the following prompt:

> In considering what constitutes "material facts", it is helpful to recall the English Court of Appeal's decision in *Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350 where Ralph Gibson LJ held, at p. 1356 paras G-H, as follows:
>
> > The material facts are these which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by assessment of the applicant or his legal adviser ...

[39] In my considered view, these facts were material to the *ex parte* application. Had they been disclosed at the time when the applicants applied for the *ex parte* order, this court would have considered the *ex parte* application on a different footing. In the present case, these material facts had not been disclosed by the applicants when the *ex parte* application was made.

Whether The Private Caveat Ought To Be Removed

[40] It is well-settled that in dealing with an application for the removal of a private caveat, the court must consider these questions in the following manner:

(i) firstly, the caveator must satisfy the court that the interest in the land as expressed in Form 19B of the National Land Code is a caveatable interest as envisaged under sub-s. 323(1)(a), (b) or (c) of the National Land Code,

(ii) secondly, if the court finds that the caveator does have a caveatable interest in the land, the caveator thereafter needs to satisfy the court on a *prima facie* basis that based on the evidence, the interest of the caveator in the land is not frivolous or vexatious and does raise a serious question to be tried, and

(iii) thirdly, it is for the court to consider whether on the balance of convenience the caveat ought to be so extended pending the disposal of the main action by preventing the land from being disposed of to a third party by the caveatee or landowner.

Whether The Applicants Have A Caveatable Interest

[41] In delivering the judgment of the Court of Appeal in *Devi Meyyammai M Ramanathan & Anor v. Hartini Mohamad & Anor* [2013] 3 CLJ 31; [2013] 3 MLJ 813; [2013] 3 MLRA 439; [2013] 4 AMR 117, Her Ladyship Aziah Ali JCA (later FCJ) made the following prompt:

> [9] A caveator must first satisfy the court that he has a 'caveatable interest' in the land (*Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441). Under the NLC, whether or not a person or body has any caveatable interest must be determined with reference to s. 323(1)(a), (b) or (c) (*Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802). ...
>
> [19] Having found that the appellants' claim as expressed in Form 19B amounts to a caveatable interest, the next question that has to be considered is whether the appellants have shown that on the factual matrix their claim is not frivolous or vexatious and that their claim discloses a serious question that merits a trial. The onus is upon the caveator to satisfy the court that on the evidence presented his claim to an interest in the property does raise a serious question to be tried, and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party (per Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] CLJU 18; [1979] 1 LNS 18). At this stage of the proceedings what is required of the appellants is to show that they have a *prima facie* case and not that they must ultimately succeed. ...

[42] A caveatable interest is a creature of statute by virtue of sub-s. 323(1) of the National Land Code. As such, one cannot validly assert a caveatable interest unless he can bring himself within any of the categories envisaged in paras. (a), (b) or (c) of sub-s. 323(1) of the Code.

Subsection 323(1) of the National Land Code provides as follows:

> **Applications for entry of private caveats**
>
> 323. (1) The persons and bodies at whose instance a private caveat may be entered are -
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

[43] The meaning of the phrase "caveatable interest" was examined by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719; [1995] 1 MLRA 225; [1995] 2 AMR 969 and cited with approval by the Federal Court in *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802; [2012] 6 MLJ 475; [2012] 6 MLRA 216; [2012] 5 AMR 485. Speaking for the apex court in *Score Options Sdn Bhd* (*supra*), His Lordship The Right Honourable Arifin Zakaria CJ observed as follows:

> [34] In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520 at p. 547. Gopal Sri Ram JCA (as he then was), discussed at length what is meant by caveatable interest as distinguished from other interest in land. He stated:
>
> > To paraphrase s. 323(1)(a) of the Code, a private caveat may be entered at the instance of any person or body who claims either:
> >
> > (1) the title to land; or
> >
> > (2) any registrable interest in Land.
> >
> > The parameters of caveatability under s. 323(1)(a) are therefore circumscribed by these words: "title" and "registrable interest". It is only one who makes a claim to either of these in land may enter a private caveat.
> >
> > Although the words "title" and "registrable interest" are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, s. 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.
> >
> > In my judgment, the position that obtains under the Code, so far as is relevant to the present appeal, may be stated in the following way. The Code creates three categories of interests in land. They are as follows.
> >
> > Category 1: Registrable interests in land.
> >
> > Only certain interests are capable of registration. Within this are two subcategories, namely:
> >
> > (a) Registered title. This may be in perpetuity or for a term of years. It pertains to ownership of land. The "owner" is termed by the Code as a "registered proprietor",
> >
> > (b) Registrable interests falling short of ownership. These are leases charges and easements. Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in s. 340(1), confers indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions which, if established, may operate to defeat such registered title or interest;

A

Category 2: Interests that are incapable of registration. These include tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title;

Category 3: Caveatable interests.

B

These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of s. 323(1)(a), it is only a claim to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat. Cases falling under category (2) are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest. Protection for such interests must be secured in the manner prescribed by the Code. I fear that any other construction upon s. 323(1)(a), especially one that places a meaning wider than that I subscribe to, may result in judicial disobedience to the will of Parliament: and that in my view should be avoided at all cost.

C

D

[35] It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.

E

[36] Emphasis should be given to the words "registrable interest" in s. 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

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[44] In the prescribed Form 19B, the grounds stated by the first and second applicants in support of the application to enter the private caveats are reproduced *in verbatim* in the original language for ease of reference as follows:

G

2. Alasan-alasan tuntutan ***saya**/kami ke atas *tanah/**kepentingan** itu ialah -

(a) Lunar Dollars Sdn Bhd [No. Syarikat: 889879-P] ("Nomini") telah atas arahan kami, memasuki suatu surat tawaran untuk membeli bertarikh 13.06.2022 dengan Saerah Binti Saad Lobb [No. K/P: 760202-05-5352/A32856765 ("Penjual") untuk membeli:-

H

(i) hartanah yang dipegang di bawah suratan hakmilik yang diperihalkan dalam jadual di bawah ini, iaitu Pajakan Negeri No. Hakmilik 167, No. Lot 33792, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur dan beralamat di No. 37, Jalan Tuanku Ampuan, Taman Duta, 50480 WP Kuala Lumpur dengan harga sebanyak Ringgit Malaysia Lima Belas Juta (RM15,000,000.00) sahaja ("Lot 33792"); dan

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(ii) hartanah yang dipegang di bawah suratan hakmilik yang diperihalkan dalam jadual di bawah ini, iaitu Pajakan Negeri No. Hakmilik 167, No. Lot 33793, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur dan beralamat di Jalan Tuanku Ampuan, Taman Duta, 50480 WP Kuala Lumpur dengan harga sebanyak Ringgit Malaysia Lima Juta (RM5,000,000.00) sahaja ("Lot 33793"),

(secara kolektif, "Hartanah-hartanah") untuk harga keseluruhan Ringgit Malaysia Dua Puluh Juta (RM20,000,000.00) sahaja. Atas arahan kami, Nomini tersebut telah membayar wang pendahuluan sebanyak Ringgit Malaysia Empat Ratus Ribu (RM400,000.00) sahaja (iaitu Ringgit Malaysia Tiga Ratus Ribu (RM300,000.00) sahaja untuk Lot 33792 dan Ringgit Malaysia Satu Ratus Ribu (RM100,000.00) sahaja untuk Lot 33793).

(b) Nomini tersebut selanjutnya telah mencalonkan kami sebagai pembeli kepada Hartanah-hartanah tersebut dan terma-terma dan syarat-syarat perjanjian jual beli bagi Hartanah-hartanah tersebut telah dianggap sebagai dimuktamadkan pada 20.04.2023.

(c) Sementara menunggu pindahmilik disempurnakan dan perserahan pendaftaran suratcara pindahmilik bagi Hartanah-hartanah tersebut kepada kami, kami ingin memasukkan kaveat ini untuk melindungi hak-hak dan kepentingan kami yang boleh didaftarkan terhadap Hartanah-hartanah tersebut.

[45] In the statutory declaration jointly affirmed by the first and second applicants in support of the application to enter the private caveats, both the first and second applicants confirmed that they were the applicants in the prescribed Form 19B and that the grounds relied on in support thereof were true. Other than making reference to the specific lot at para. 1, the rest of the contents of the joint statutory declaration were the same.

[46] The grounds relied on by the first and second applicants in the joint statutory declaration for Lot 2 are reproduced in the interest of easy reference. In the original language, it read *in verbatim* as follows:

1. Kami merupakan individu yang ingin memasukkan kaveat persendirian terhadap suatu hartanah yang dipegang di bawah suratan Hakmilik Pajakan Negeri No. Hakmilik 167, No. Lot 33792, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur dan beralamat di No. 37, Jalan Tuanku Ampuan, Taman Duta, 50480 WP Kuala Lumpur ("Hartanah");

2. Pernyataan yang tersebut di perenggan 2 dalam Permohonan Untuk Memasukkan Kaveat Persendirian (Borang 19B, Kanun Tanah Negara) yang dibuat oleh kami mengenai Hartanah tersebut adalah benar dan kami dengan ini mengesahkan tuntutan kami di dalam Borang 19B tersebut.

[47] It is pertinent to note that on 28 April 2023, the first and second applicants in the prescribed Form 19B stated that they have rights and interests which may be registered in respect of the two lots of land. It was these rights and interests which they sought to protect when the private caveats were entered. According to what was stated by the first and second applicants in Form 19B, this purported footing was premised on the following reasons:

(i) that the total sum of RM400,000 have been paid towards the purchase of the two lots of land by Lunar Dollar Sdn Bhd ("Lunar Dollar") on the instructions of the first and second applicants;

(ii) that Lunar Dollar has "nominated" both the first and second applicants as the purchasers for the two lots of land;

(iii) that the terms and conditions of the sale and purchase agreement were deemed to have been finalised on 20 April 2023; and

(iv) the caveat was entered pending perfection of the transfer and presentation for registration of the memorandum of transfer.

[48] In crux, the registrable interest alluded to by the first and second applicants rested on these main fronts:

(i) the impugned document was a "lock-out agreement", and

(ii) the alleged acceptance by the first and second applicants of the purported final sale and purchase agreements for the two lots of land.

[49] Learned counsel for the applicants argued that the impugned document was in the nature of a lock-out agreement. In propping up the applicant's case in support of that argument, learned counsel for the applicant contended that the impugned document was a "lock-out agreement" because:

(i) the "lock-out agreement" was entered into between the parties in order to finalise all ancillary terms of the sale and purchase agreement,

(ii) the two lots of land were to be sold on "as is where is" basis,

(iii) the "lock-out agreement" had clearly identified the parties, the purchase price and the subject of the sale and purchase transaction.

[50] On the other hand, learned counsel for the proposed intervener referred this court to the decision of His Lordship Justice Visu Sinnadurai in *Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners)* [1996] 3 CLJ 393, which provided elucidating descriptions of what a lock-out agreement is all about.

[51] By way of *dicta*, His Lordship Justice Visu Sinnadurai in *Abdul Rahim* (*supra*) at pp. 408 to 409 (CLJ) referred to the English cases of *Walford v. Miles* [1992] 1 All ER 453 and *Pitt v. PHH Asset Management Ltd* [1993] 3 All ER 961 and said as follows:

A lock-out agreement is an agreement which is entered into by a potential purchaser and a vendor of real property whereby the vendor for good consideration agrees for a specified period of time, not to negotiate with anyone except the potential purchaser in relation to the sale of his property in which the potential purchaser has expressed an interest in purchasing. Such an agreement was given judicial recognition by the House of Lords in *Walford v. Miles* [1992] 1 All ER 453, and subsequently applied by the Court of Appeal in *Pitt v. PHH Asset Management Ltd.* [1993] 3 All ER 961.

...

There are two essential elements in a lock-out agreement: (a) the agreement must contain a negative undertaking; and (b) it must be for a fixed duration. Such a lock-out agreement is treated as collateral contract, if a subsequent contract is entered into between the parties. As a lock-out agreement is an independent and binding agreement, a breach of the lock-out agreement by the vendor will entitle the purchaser to sue for damages.

[52] Essentially, a lock-out agreement or a lock-out clause in a potential sale and purchase transaction would be enforceable as an independent agreement if it carries a term which is negative in nature. That means the term must be one which restricts the vendor from negotiating the sale of the property with another party within the lock-out period. Next, the period of the lock-out must be fixed. In the absence of these characteristics, one cannot claim that he has a lock-out agreement in hand. However, a lock-out agreement does not accord the purchaser with the right to purchase. It simply preserves the property for the interest of the potential purchaser during the specified period. It practically "locks" the vendor out of negotiation with other parties.

[53] The impugned document which was signed by the parties carried the following type-written terms *in verbatim*:

Temporary Receipt (For Sale) Date: 13th June 2022

Received from: Lunar Dollars Sdn Bhd & Or Its Nominees

The sum of: **Ringgit Malaysia: Four Hundred Thousand Only (RM400,000.00)**

Payable by cheque: PBB 473858

Being booking deposit for purchase or property located at **LOT NO. 33792, Pajakan Negeri No. 167 & Lot 33793, Pajakan Negeri No. 168, Jalan Tengku Ampuan, Taman Duta, 50480 Kuala Lumpur (Leasehold).**

The Sale and Purchase Agreement has to be signed within **twenty one (21)** working days subject to terms and conditions of the Sale and Purchase Agreement to be mutually agreed between the Vendor and Purchaser. The Vendor can forfeit the booking deposit only if the Purchaser decides to withdraw from the sale before signing the Sale and

A Purchase Agreement, unless the reason for withdrawal by the Purchaser is for reason that the Vendor and Purchaser cannot mutually agree on the terms & conditions of a Sale and Purchase Agreement.

The Agreed Terms Of Purchase Are:

1. Agreed Purchase Price of the abovementioned property is **RM20 million only.**

B

2. a 10% as down payment of the said Purchase Price is to be settled upon signing of the Sale and Purchase Agreement. The above said booking deposit will be considered as a part of the Purchase Price upon signing of the Sale and Purchase Agreement.

C

3. 90% Balance of the Purchase Price is to be settled according to the Sale & Purchase Agreement within three (3) months from the date of Sale & Purchase Agreement whichever the later with an extension of one (1) month grace period wherein the Purchase shall pay interest of 8% per annum.

D

4. If the Vendor chooses not to sell the above said property to the Purchaser after all the terms of the Sale and Purchase Agreement have been mutually agreed upon, the Vendor is liable to refund the booking deposit collected and also to compensate the Purchaser, "dollar for dollar" *ie*; a further sum equivalent to the amount of deposit paid by the Purchaser to the Vendor.

E

5. The buyer and seller shall each bear own legal fees.
6. The property to be sold as is where is basis.

(emphasis added)

followed by the following terms which was handwritten by insertion:

F

For the avoidance of doubt, the Vendor will not be liable, financially or otherwise, for any delays in the issuance of CCC for the built property.

and ended with the following type-written terms:

Vendor's Acknowledgement:

G

This booking deposit of **Ringit Malaysia: Four Hundred Thousand Only (RM400,000.00)** shall be made payable to **Thevan Realty (Client Account)**. If the Purchaser decides to withdraw from the sale before signing the Sale and Purchase Agreement, for any reason other than if the Vendor and the Purchaser cannot agree to a set of terms and

H

condition for the Sale and Purchase Agreement, the booking deposit collected will be forfeited and it will be shared on a 50/50 basis between Thevan Realty and the Vendor. I, the Vendor will keep Thevan Realty fully indemnified against all cost and actions in the event that I abort the above said deal.

(emphasis added)

I

[54] A careful reading of the impugned document would immediately show that it was to evidence the receipt of the sum of RM400,000 from the third applicant or its nominees. It was in fact entitled "Temporary Receipt (For Sale)". It showed that the RM400,000 was paid *vide* PBB Cheque No. 473858 as a booking deposit for the purchase of Lot 2 and Lot 3. It specified the necessity to have a mutually agreed sale and purchase agreement to be signed within 21 days. It spelt out how the booking deposit was to be treated should there be a withdrawal from the transaction. It contained the proportion and manner of payment of the purchase price. It laid down the consequences if the proposed intervener chose not to proceed with the sale transaction after the terms had been mutually agreed between the parties. It declared the two lots to be sold on "as is where is" basis. Effectively, nothing more.

[55] The impugned document did not even come close to the description of a lock-out agreement known in law. It plainly did not possess the necessary qualities and hallmarks as alluded to by His Lordship Justice Visu Sinnadurai in *Abdul Rahim* (*supra*). Even if the impugned document were a lock-out agreement in the true sense of the word, I cannot fathom how such an agreement could constitute a basis for the applicants' claim of a caveatable interest in the two lots of land in the absence of a duly executed sale and purchase agreement.

[56] In the written submissions, the learned counsel for the applicants contended that the sizes of both Lot 2 and Lot 3 were expressly stated in the "lock-out agreement". This was clear from a reading of para. 14(a) of the applicants' written submissions (encl. 29) dated 26 December 2023. Learned counsel for the applicants also submitted that there was a breach of the "lock-out agreement" when the first defendant significantly changed the size of the two lots of land. This was apparent from a contextual reading of paras. 32 to 38 of the same written submissions. I find this rather disturbing and misleading as to the facts, to say the least. In substance, the impugned document which was referred to by learned counsel for the plaintiffs as the "lock-out agreement" contained no such particulars on the sizes of the two lots of land.

[57] The sale and purchase agreement has yet to be signed. There have only been exchanges of various drafts, one after another up till the 14th draft sent by email on 18 February 2023 by the first and second applicants' conveyancing solicitors to the proposed intervener's conveyancing solicitors. The chronology on the exchange of the drafts was tabulated in detail by learned counsel for the proposed intervener in his written submissions.

[58] It is the finding of this court that the contention of learned counsel for the applicants that the respective sale and purchase agreements for the two lots of land have been "finalised" and "came into existence" on 20 April 2023 was without basis. In order to be effective, the sale and purchase

agreement must first of all, be properly executed. That would serve as a signification that the parties have agreed with the terms and conditions contained in the sale and purchase agreement.

[59] The contemplation of parties must be given effect by this court. Since the formality of an executed agreement was a clear choice made by the parties, there could be no binding contract without a duly signed sale and purchase agreement. In that instance, it was only reasonable to conclude that there was no *consensus ad idem*. (See: *Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor* [2015] 8 CLJ 1068; [2016] 6 MLJ 310; [2015] 6 MLRA 583).

[60] However, that was not the case in the present instance. The sale and purchase agreements remained as drafts and were never signed. It must follow that the contention on the purported "registrable interest" pursuant to s. 323 of the National Land Code must fail.

Whether The Interest Of The Caveator In The Land Is Not Frivolous Or Vexatious And Does Raise A Serious Question To Be Tried

[61] It was observed that the thrust of the plaintiffs' case was that there was a concluded contract between the parties for the sale and purchase of Lot 2 and Lot 3. This was based on the following contentions:

(i) that the impugned document was in the nature of a "lock-out agreement";

(ii) the respective sale and purchase agreements for Lot 2 and Lot 3 have been "finalised" and "came into existence" on 20 April 2023 thereby conferring upon the first and second applicants registrable interest pursuant to s. 323 of the National Land Code; and

(iii) the proposed intervener as the vendor had failed to keep her end of the bargain in the sale and purchase transaction.

[62] However, I find that the plaintiffs have failed to demonstrate to this court the existence of a serious issue to be tried. The impugned document did not fit the label of a "lock-out agreement" despite being repeatedly called as such by learned counsel for the applicants. I have alluded to the reasons for arriving at such a finding in the earlier part of this judgment. Without first qualifying as a lock-out agreement in the true sense of the words, a consideration of whether in fact the impugned document constituted a serious issue to be tried as to the caveatable interest of the applicants was, to my considered mind, utterly inconceivable.

[63] The sale and purchase transaction cannot be said to have been sealed between the parties because it was never signed in the first place. The reason was simple – the parties had not mutually agreed on the terms of the sale and purchase agreement. Indeed, a particular fact does not become an issue to be tried just because it was asserted as such.

[64] I am mindful of the argument raised by learned counsel for the first and second applicants that only a 2% deviation in the size of the land was acceptable. However, the decisive factor was the mutual agreement of parties as to the terms and conditions of the sale and purchase agreement. Where the parties were unable to mutually agree on the terms, there cannot be a *consensus ad idem*. The "mutual agreement" term was manifestly explicit in the impugned document, whereas the alleged terms in respect of the obligation to preserve the respective sizes of the two lots of land or the acceptable 2% margin for any changes in size were conspicuously not.

[65] In considering the facts and evidence as disclosed in the affidavits in totality, it is the finding of this court that there were no serious issues to be tried insofar as the alleged caveatable interests of the applicants were concerned.

Whether On The Balance Of Convenience The Caveat Ought To Be So Extended Pending The Disposal Of The Main Action

[66] Since the applicants failed to demonstrate to this court that they had acquired a caveatable interest in respect of the two lots of land, I hold the considered view that damages would be adequate compensation should this court were to return a finding favourable to them. Their interest should remain monetary as distinguished from proprietary. On the same breadth, this court also found that the balance of convenience was in favour of the first defendant.

Conclusion

[67] On the basis of the foregoing reasons, this court allowed the proposed intervener leave to intervene and set aside the *ex parte* order and damages to be assessed. Cost of RM10,000 is allowed in favour of the intervener.